SUPREME COURT, U. S.

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JOHN F. DAVIS, C

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

NO. 499

CITY OF AUSTIN, APPELLANT

V.

CHARLES A. WEBSTER, APPELLEE

ON APPEAL FROM THE SUPREME COURT OF

THE STATE OF TEXAS

JURISDICTIONAL STATEMENT

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AFFIDAVIT OF SERVICE

THE STATE OF TEXAS §

COUNTY OF TRAVIS §

BEFORE ME, the undersigned authority, this day personally appeared R. L. (Bob) Andrews, who after being by me duly sworn upon oath said that he is an attorney for the City of Austin as appellant to the Supreme Court of the United States in the above entitled and numbered cause, and that on the _____ day of September, 1968, he served a copy of the foregoing Jurisdictional Statement on Joe Colbert, of Garey, Colbert & Kidd, 1010 Brown Building, Austin, Texas, attorney for Appellee, Charles A. Webster herein, by certified mail, return receipt requested, depositing the same, in an envelope so addressed to him, in a United States Post Office mail box in Austin, Texas,

with first class and other appropriate postage prepaid and affixed thereto, and that all parties required to be served have, thereby, been served.

R. L. (BOB) ANDREWS

SUBSCRIBED AND SWORN TO BEFORE ME this _____ day of September, 1968, to certify which witness my hand and seal of office.

Notary Public in and for Travis County, Texas

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

NO. _____

CITY OF AUSTIN, APPELLANT

V.

CHARLES A. WEBSTER, APPELLEE

ON APPEAL FROM THE SUPREME COURT OF

THE STATE OF TEXAS

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinions of the Texas Supreme Court justices, upon which that court's orders are based in this cause, are not printed officially

or unofficially. Writ of error practice in Texas as applied to this case is authorized by Texas Rules of Civil Procedure, Rules 467-473, 480-486, and 496; and by article 1729 of the Revised Civil Statutes of Texas, as amended. The effect of the refusal of the writ, and the overruling of appellant's motion for rehearing of its application therefor is indicated in Rule 483, which is set forth in the Appendix, infra. That rule requires a denial of applications for writ of error, as in this case, when our state Supreme Court is of the opinion that the judgment of the Court of Civil Appeals "is a correct one." Rule 483 does make it clear that, by the notation "'Refused. No reversible Error,'" in its order denying the application, the highest state court to which appellant could apply was not satisfied with the opinion of the intermediate court. But if appellant's constitutional attack is considered, there

is no substantial state ground for disposition herein which overrides it. This is because, in the exercise of its power to place controlling construction upon its own state's statutes, the Texas Supreme Court, by refusing to uphold appellant's nonfederal theory, necessarily made an unconstitutional statutory application to appellant's prejudice in the circumstances of this case.

The orders and judgments of the state appellate courts in this case, and the opinion of the Court of Civil Appeals, reported in 424 S.W.2d 720, are set forth in the Appendix, infra.

JURISDICTION

This is a workmen's compensation case originating in an admittedly compensable back injury, brought under the Texas laws codified from articles 8306 through 8309f of the Revised Civil Statutes of Texas, as amended. The statutory provisions attacked

are those of sections 12b and 12e of article 8306. The authority for municipal workmen's compensation programs is article 8309e, enacted in 1953. Section 6 of article 8309e adopts the provisions of sections 12b and 12e of article 8306, inter alia. These two last-mentioned sections have not been amended since their 1917 enactment. Therefore, the same case and statutory authorities, on state questions, apply alike to commercial subscribing employers and their insurers, as well as to municipal subscribers and their insurers, or instead to municipal subscribers alone which are self-insured as is appellant.

Sections and articles from the workmen's compensation laws of Texas, including at least the above-mentioned ones, will hereinafter be indicated by the designation "section" or "article" followed by the number thereof.

The trial-court judgment for appellee awarded him maximum weekly compensation benefits based upon a jury verdict finding permanent-total incapacity, which finding was never challenged for sufficiency of evidence. The initial issues included the one here on appeal. It is simply whether the trial court properly excluded evidence showing that surgery was tendered to appellee long before his weekly maximum compensation payments were terminated by appellant, and that a surgical procedure appropriate to his alleged and prima-facie incapacitating physical condition (hotly disputed) would be safe and either curative or beneficial enough to reduce incapacity.

Appellant's theory under state law was that an adequate predicate was laid for introducing this medical evidence, based upon cases beginning with Truck Insurance Exchange v. Seelbach, 161 Tex. 250, 339

S.W.2d 521 (1960)(hereinafter called Seelbach). Evidence therein was excluded, but Appellant contended that it had met all the requirements of that case; that other Texas Supreme Court opinions had at least inferentially endorsed the clearly-announced predicate requirements in Seelbach as being the only ones; and that no Texas Civil Appeals cases existed which could not be explained upon obviously adequate alternate grounds, requiring the judgments reached therein.

Such predicate steps which appellant has always conceded to be uncontrovertibly vital under Seelbach are (1) the tender of surgery and (2) the admission of liability by the insurer at a timely stage in proceedings had in the case before the state Industrial Accident Board. Appellant concedes no more, its federal theory also being that these are the only constitutional

predicate requirements, and are fully satisfied under the case facts. In summary, appellant's federal attack has always amounted to one against the applicability of a construction of sections 12b and 12e in cases including this one, once those two admittedly essential steps were taken at a timely stage before the Industrial Accident Board (hereinafter called Board). Seelbach reaffirmed the principle that "the rights and obligations of the parties in a suit brought under the Workmen's Compensation Act are entirely controlled by the statute . . . ." 339 S.W.2d 521 at 523. The application of the evidentiary exclusion (so frequently appropriate, under these two statutory provisions) was attacked as violative of federal due-process and equal-protection quarantees, in appellant's Amended Motion for New Trial.

Trial-court judgment for appellee was duly and timely appealed. It was affirmed by the Austin Court of Civil Appeals on January 31, 1968, which overruled appellant's motion for rehearing in that court on February 28, 1968. Appellant duly and timely filed its Application for Writ of Error seeking review in the state Supreme Court, by filing the same in the Court of Civil Appeals. The Supreme Court entered an order, "Refused. No Reversible Error" on May 15, 1968. Appellant's duly and timely filed motion for rehearing of said application, as petitioner to that court, was overruled on June 12, 1968 by the Supreme Court of Texas. Appellant gave Notice of Appeal by filing it in the Court of Civil Appeals, which was possessed of the record, on September 6, 1968, and in the Texas Supreme Court on September 7, 1968. Dates

of decision were also dates of entry of these aforementioned judgments and orders.

Jurisdiction to review a judgment of the highest court of a state is conferred on this court by 28 U. S. C. Secs. 1257(2) and 2101(c). Jurisdiction by appeal under the former section exists in this case.

This case is rightfully presented as an appeal, but in any event there is jurisdiction in this court under the last-mentioned statute. Cases sustaining jurisdiction of this appeal include: Warren Trading Post Company v. Arizona State Tax Commission, 380 U.S. 685, 686, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965); American Oil Company v. Neill, 380 U.S. 451, 455, 85 S.Ct. 1130, 14 L.Ed.2d 1 (1965); Marcus v. Search Warrants, 367 U.S. 717, 721, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961); Allied Stores v. Bowers, 358 U.S. 522, 525, 79 S.Ct. 437, 3 L.Ed.2d 480 (1959); Kern-Limerick, Inc.

v. Scurlock, 347 U.S. 110, 121 74 S.Ct. 403, 98 L.Ed. 546 (1954); Standard Oil Co. v. New Jersey, 341 U.S. 428, 436, 71 S.Ct., 822, 95 L.Ed. 1078 (1951); Wheeling Steel Corporation v. Glander, 337 U.S. 562, 566, 570, 69 S.Ct. 1291, 93 L.Ed. 1544 (1949); Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 206, 68 S.Ct. 461, 92 L.Ed. 649 (1948); Greenough vs. Tax Assessors, 331 U.S. 486, 497, 67 S.Ct. 1400, 91 L.Ed. 1621 (1947); United States v. Allegheny County, 322 U.S. 174, 192, 64 S.Ct. 908, 88 L.Ed. 1209 (1944); Standard Oil Co. v. Johnson, 316 U.S. 481, 62 S.Ct. 1168, 86 L.Ed. 1611 (1942); Municipal Investors Ass'n v. City of Birmingham, 316 U.S. 153, 157, 62 S.Ct. 975, 86 L.Ed. 1341 (1942); Hamiton v. Regents, 293 U.S. 245, 257, 258, 55 S.Ct. 197, 79 L.Ed. 343 (1943); Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 287, 42 S.Ct. 106, 66 L.Ed. 239 (1922).

Whether review were to be by appeal or certiorari, appellant chiefly attacks the unreasonableness and totally indefensible and irrational application to it of a rule which produces absolutely no socially justifiable result. Only a few simple facts can be found to differentiate this case from that found in the accepted authority, Truck Insurance Exchange v. Seelbach, 161 Tex. 250, 339 S.W.2d 521 (1960). But the difference is crucial, in that the necessity for medical speculation was not removed by the insurer for Seelbach, while, on the other hand, Webster chose trial instead of surgery. Promoting the avoidance of such a necessity is the only rational object of the Seelbach rule's application. Such a rule found no such evil on which to operate in this case. If appellee had postponed trial in favor of any needed operation already tendered, he would have had his results, good or bad. He

would not have had to face medical speculation. The need for an operation is immaterial. Appellant does not have to prove his case for him. The need of course would depend upon whether he was in fact ever incapacitated for very long by an injury the very nature of which was shown to lend itself to diagnosis chiefly in situations where, as his witness testified, there is patient-doctor integrity.

The difference between the Seelbach situation and the Webster situation is crucially one of there being no necessity for undergoing the risks of medical speculation in the latter. The chief constitutional argument is, whether review should be by appeal or certiorari, that promoting protection of the claimant from situations presenting such a necessity is the only rational object of the Seelbach rule's application. In cases such as ours, which present no such vice, there is nothing upon which it can validly operate.

If the lack of medical evidence were to be given the significance attached to it by the Court of Civil Appeals' opinion, then the very class of claimant who would most benefit would be the least deserving, viz., the one who never was hurt in the first place, and who feigns his infirmities from the beginning. Nor is there any rational justification for protecting an obviously injured claimant by depriving an insurer of a right to be heard on a relevant defense (correctible incapacity) when such necessity for medical speculation has been removed. This is especially true since under Kelly v. Industrial Accident Board, 358 S.W.2d 874 (Tex.Civ.App. -- Austin 1962, writ ref'd), holding that medical reports cannot be required to be produced by the Board, it is easy to hide evidence on a disabling condition which is largely to be evaluated by claims of subjective symptoms, such as the claimed lumbar disc injury

which only at trial did appellee try to substantiate.

Such a tenous prognosis as was shown to attach to this type of injury would never invoke the Board's discretion to compel surgery with the result that the claimant is forced to an election of seeking a maximum of 52 rather than 401 weeks of benefits, as provided by the combined effect of sections 12b and 12e. The effect of Board Rule 5.201, shown in Appendix D, infra, is to afford what amounts to a practical impediment to initiation of procedures by a carrier, uninformed of a claimant's true state of health, who wants the Board-supervised examination which must precede consideration of a possible order for surgery. The only Board-ordered examination was unsuitable as such a preliminary measure and was only to permit the gathering of medical evidence if

appellant's medical appointee could find anything of significance.

Only appellant can complain that it lost the right to force appellee to surgery, and appellant has never so complained. The Board simply requires (in violation of section 12e) a prima-facie showing by the insurer of the facts which would support a Board order for surgery before it will even order an official medical examination which must meet the statute's prescribed standards for considering the issuance of an order to submit to surgery. But such an administrative disregard of the provisions of section 12e when an insurer makes the demand which appellant made (see Appendix D, infra), cannot affect substantive rights.

A matter of pivotal importance must be noted, in order to negate any state ground

for supporting the judgment appealed. The avoidance of an operation, not ordered by the Board, can never do more than lead to a full trial on the issue of unavoidable incapacity. The reasonableness of the claimant's avoidance of treatment is of no consequence. He can still seek to persuade, and be awarded by, the jury the maximum limit of damages based upon such incapacity. This honorable court is not faced with a statute which, in effect, calls into operation the need to test the discretion or wisdom of either Board or claimant in deciding against or rejecting surgery.

The present Texas procedure, in situations such as this one where the Seelbach exclusion is made to silence the cooperative carrier, endorses what is clearly a deprivation of due process, and possibly also equal protection, of the law. Review by either appeal or certiorari surely must be available

to correct this insupportable denial of all-out litigation in an unabridged hearing on all relevant facts.

But the provisions of statutes (in this case, sections 12b and 12e of article 8306), from which the workmen's compensation laws owe their entire existence, are necessarily applied despite the argument that this produces an unconstitutional result, so that review by appeal is in order. The court in Seelbach made this indelibly clear by observing that to allow the evidence in question "would be tantamount to applying the provisions of secs. 12b and 12e in the trial court," an administrative function held not to be vested in the courts.

There is no state ground which can moot the constitutional issue in this appeal. The lack of any evidence being available to appellant points up the absurdity of the exclusionary rule if that is the basis. So does any significance attached to lack of a Board order. But a Board order gives a claimant nothing advantageous. An offer of surgery, which he accepts, accomplishes all that a Board order would compel him to accept, at the risk of a statutorily-imposed maximum recovery if grounds for the Board order are upheld by the jury.

The lack of a Board order, or even no evidence at the Board stage which would justify such an order in the first place, does not constitute a state ground for affirmance. The significant inquiry determining admissibility of prospective surgical benefits, if rationality must still exist to connect a rule with an evil to be remedied by the rule, is

whether or not acceptance of surgery, with liability on the insurer for all the consequences of it and the injury requiring it, has been placed within the power of the claimant. Then, if it has and if he nevertheless goes to trial without surgical rehabilitation, it is either because he has no infirmity in fact to justify any invasion of his body, or he would prefer to either permanently or temporarily put it off. In either event, the jury should get to evaluate its probable safe application, since there is no "all-or-nothing" alternative to be taken in disposing of the effect of his refusal to undergo operative correction.

It has been necessary to virtually cover the constitutional contentions under this discussion of jurisdiction. This is because only the lack of a state ground for affirmance will permit such contentions to be reached. And the lack of a state ground is clear only

if recognition of any such ground amounts to a denial of appellant's right to a full hearing without any rational basis for such an abridgment. Only when such otherwise adequate state grounds, including (1) no evidence at the Board stage to justify surgery, and (2) no entry of an order requiring surgery, are shown to be irrational impositions on the right to a full hearing before judgment, can the immediate inquiry of jurisdiction be hurdled.

Due to the way in which the constitutional complaints in this case have arisen, requiring this lengthy discussion, the argument under the section treating substantiality of the questions is accordingly abbreviated.

Only one further arguable state ground for affirmance and mooting of any constitutional complaint appears to be warranted, namely, the Court of Civil Appeals' intimation that the substance of appellant's liability admission might be fatally defective. The

same intermediate court had before required such an admission to amount to one which identified a specific disabling lesion, which would often be an undertaking that even a possible disc-injury victim could not meet, during the period of "conservative treatment" of ambiguous signs and symptoms.

This test, suggested in Hardware Mutual Casualty Company v. Courtney, 353 S.W.2d 299 (1962)was ignored in the Supreme Court, Hardware Mutual Casualty Co. v. Courtney, 363 S.W.2d 427 (Tex. Sup. 1963)(hereinafter called Courtney). The liability admission of the carrier was deemed insufficient in that court for an entirely different and contrasting reason. The termination of benefits prior to admission of liability (which was not clearly made under any reading of the opinion) and the contention that the claimant had already been overpaid was held inconsistent with either an unambiguous admission of liability or tender of

surgery (which would not be needed by an "over-paid" claimant who had recovered).

The Supreme Court of Texas in Courtney approved in general what amounts to a description of the steps appellant took before the Board, namely,

> "the substance of the following: a compensable injury to the employee in the scope of employment; liability for the injury for which a surgical operation would or should prove beneficial to the employee; liability for the cost of the operation, including doctors, hospital, medical, and convalescent care as prescribed by the statute and the Board; and liability for the consequences of the operation, within the provisions of the workmen's compensation act. . . ."

The most that any insurer can rationally be required to admit is that, to the extent it has been able to ascertain the claimant's condition, or to the extent that the claimant himself has specified it in his claim or otherwise, the carrier concedes it and offers corrective treatment. The whole purpose of the admission is to clear the way for rehabilitative treatment with all its costs and consequences being

assumed as compensable by the insurer. A claimant who chooses to avoid such rehabilitation will do so just as steadfastly if the carrier happens to devine just exactly the hidden nature of his infirmities.

STATUTES INVOLVED

The lengthy provisions of the two statutes involved are set out in appendices B and C. They are, respectively, the statute of primary concern, enacted Texas Laws 1917, ch. 103, sec. 1 at 278-79, and being Texas Revised Civil Statutes Annotated article 8306, sec. 12e; and the statute the provisions of which are partially incorporated therein for certain purposes, enacted Texas Laws 1917, ch. 103, sec. 1 at 277-78, and being Texas Revised Civil Statutes Annotated art. 8306, sec. 12b.

QUESTIONS PRESENTED

Is a workmen's compensation carrier, or self-insurer, under sections 12b and 12e of Article 8306, Revised Civil Statutes of Texas, as amended, afforded the equal protection and due process of law, both substantive and procedural, which the Fourteenth Amendment of the United States Constitution guarantees, . . .

1. when it is prohibited from proving, based upon the hypothetically assumed truth of the very evidence, from plaintiff and his own treating medical witness, of his permanent incapacity from an admittedly compensable injury, that it had offered surgery to him; he had failed to accept it; and, if he had such a disabling condition, it could safely cure his condition or reduce his incapacity; despite the defendant insurer's irrevocable, timely and

properly-made admission of liability and tender of and demand for surgical treatment at its cost to be performed upon plaintiff, made long before its termination of maximum compensation payments to him;

2. when there can be no legal impediment to the claimant's obtaining a judgment, if the findings supported it, for maximum benefits under the Workmen's Compensation Laws, notwithstanding such evidence as to such probable surgical success;

3. even though, while not in any event being limited as a matter of law to a reduced amount of maximum recovery for compensation to be sought at trial, since the Texas Industrial Accident Board did not order surgery, a plaintiff may, at any time after the defendant's admission of liability is made in connection with

its tender and demand for surgery before the Texas Industrial Accident Board, nevertheless rely upon such admission (made as a necessary incident to said tender and demand) as a basis for the conclusive compensability of his claim;

4. when the insurer's effort to prove the offer of surgery and its safe and probable beneficial effects upon plaintiff (assuming his incapacity) is thwarted by its earlier inability to present evidence to the Texas Industrial Accident Board (which plaintiff has available but does not submit to it) of plaintiff's alleged persisting incapacity which he later presents in court, which evidence is part of the sine qua non for obtaining compulsory surgical treatment (which the insurer has never sought) through the exclusive means of a unanimous board order therefor; and/or

5. when the rule obtains generally and (arguably in this case) applies to an insurer's liability admission, made in connection with an attempt to demand or tender surgical treatment to a claimant, that it nevertheless is ineffective in such a case, for reasons of lack of particularity; yet it can nevertheless be invoked at any time by the claimant, to assure him that he will reach the incapacity issues and has already been conceded any question as to whether his injury, which he only perhaps particularizes at time of trial, occurred in the course of employment so as to be compensable?

STATEMENT

Appellee was undisputedly injured on January 25, 1966. Medical testimony reflected the nature of his injury as being consistent with either permanent or only a temporary lesion. But -- and this is a significant point in considering the lack of a sound basis for the exclusionary rule -- appellee's lumbar disc injury, if he had one, was not so pronounced as to provide continuing signs thereof to the specialist, Dr. Farris, a neurosurgeon, who had been engaged by appellant to give him any needed medical attention. Appellee's own medical witness, Dr. Ross, conceded that an accurate diagnosis of his condition and evaluation of his prospects for work would have to be based upon subjective factors which called for patient-doctor integrity.

In little more than six weeks, his signs

of permanent injury, which Dr. Farris testified were equally consistent with temporary incapacity (as from a strain or sprain) had greatly diminished. This undermined the first "impression," reached by Dr. Farris during clearly total incapacity, viz., that appellee had sustained a lumbar disc injury.

Appellee conceded at trial that he had not been denied any requested treatment and he understood the City of Austin to be attempting to furnish him with any needed services. Nevertheless, he declined, about February 14, 1966, and again on March 9, 1966, to proceed with a myelogram test (admittedly unpleasant) which seemed to be the only further logical step to Dr. Farris, in order to either change the conclusion he had reached, that the injury had been a mild and only temporarily disabling one (due to virtually nil signs of lesion), or to further confirm this opinion and thereby (it would

seem) to reassure appellee.

Instead of requesting services from another doctor at appellant's expense, appellee instead began seeing Dr. Ross, initially on April 8, 1966. Either then, or no later than six weeks thereafter, Dr. Ross later testified, he had diagnosed at least one injured disc in appellee's back, and confirmed its disabling effects after repeated visits, partly based upon his confident acceptance of appellee's assertion as to his persisting pain symptoms. Just through September 16, 1966 these visits totalled twelve in number.

While Dr. Ross unhesitatingly testified that appellee's condition was "permanent", appellant at trial in March, 1967, had to stand silently by, unable to take up the issue of the possibilities which surgery afforded appellee, who was undisputedly a general physical specimen. And this was

despite the fact that, within a week after appellee's last voluntary visit to Dr. Farris' office, on March 9, 1966, appellant had made its tender to appellee, by a copy of its demand therefor, of a cost-free surgical operation, together with its equally irrevocable surrender of the right, by admission, to ever take issue with him over the compensable connection between a possibly permanent back injury (hidden) and the admittedly injurious accident which he had sustained January 25, 1966. See Exhibit D, infra. Appellant also continued paying full weekly workmen's compensation to appellee through September 15, 1966.

Prior to trial, appellant's counsel was ordered not to refer to surgical possibilities in any way before the jury. The only reference to surgery which did reach them was unfavorable to appellant. This came in the form of reference, as surgeons, to the authors

whose works were used to discredit the need for relying on a myelogram to diagnose a "remissive" disc-symptom case, as against conservative treatment. This would seem indisputably to even make his avoidance of surgery (of which the jury was not aware) look like what they might assume was his inability, due to some undisclosed health risk peculiar to appellee, to utilize an operation. And since all appellant had to fight with at trial was a contention that appellee was well, there was not any reason whatever for the jury to think very kindly of appellant, being ignorant of the fact that it had been offering an operation for over a year. The fact of such surgical tender would have of course justifiably brought into question the soundness of Dr. Ross' diagnosis and the weight to be given his testimony. In effect, he stated on the stand that appellee (whom he admittedly had

to believe in forming his opinion) could not, day in and day out, perform even the lightest of physical tasks. And yet, despite the fact that he had seen appellee every few weeks since April and through and beyond the Board hearing in November, 1966, Dr. Ross was not shown to have had any inclination whatever to recommend the surgery which, on March 15, 1966 appellant had stood ready, by waiving any issue of compensability, to provide. There needed only to be a condition to which an operation could be applied.

Appellant got no benefit from the reports, prepared after each office visit, which Dr. Ross brought with him to court. They never found their way to the Board at any time. Only his bill did. They were rightfully retained under Kelly v. Industrial Accident Board, 358 S.W. 2d 874 (Tex.Civ.App. -- Austin 1962, writ ref'd), (hereinafter called Kelly). But it is interesting to

note that they would have provided the prima-facie evidence of the essential elements to be found in support of a Board order for surgery, which the Board via its Rule 5.201 requires in order to even initiate the process, which is actually a statutorily imposed duty, of ordering and supervising an official and independent medical examination to decide whether surgery will be compelled. It should be obvious that what the claimant can have for the asking (by means of the tender which appellant made) gives him all the favorable possibilities with which the Board's surgical order would have unfavorably presented [redacted], in the form of an alternative exposing him to the risk of an election against surgery. If the Board had ordered surgery and the jury had subsequently also found it to be safe, advisable and curative or rehabilitative, this would have limited him to one years' benefits, pursuant to the clear provisions

of section 12b of article 8306 (dealing with hernia) which are expressly incorporated into section 12e. See Appendices B and C, infra.

On the other hand, it is the unmistakable law in Texas that, once the claimant escapes Board jurisdiction, and even if a unanimity of medical opinion was and always had been that he needed and could safely undergo an operation which would cure or improve his condition, no such election would attach when the jury answered such questions concerning safety, advisability and beneficial effects of the unperformed surgery. Garcia v. Travelers Insurance Company, 365 S.W.2d 916 (Tex. Sup. 1963). They would still have to be submitted those issues, because if any of them were negatively resolved, the prospective post-operative rehabilitation, e.g., from a substantially dangerous operation, could not be considered, and conditional incapacity issues submitted on the hypothetical assumption

that surgery (actually unaccepted to that date) is or has been utilized could not, if answered detrimentally to appellee, reduce his recovery. He simply does not have to undergo an unsafe operation.

Nor does he lose the chance to collect the maximum benefits under the law even if, with prospective beneficial surgical results being litigated, the testimony were unanimous that the procedure would be safe and advisable. One shred of evidence from his side that, e.g., while it would be advisable to get an operation, to reduce discomfort and pain, that he would nevertheless still be totally and permanently incapacitated in the controlling economic sense, would still sustain incapacity findings to that effect.

All of appellant's pleading, on the beneficial effects of surgery, pursuant to the

exclusionary pre-trial motion in limine by appellee which was granted, was rendered ineffective as a basis for the evidence thereby prohibited. Appellant had timely alleged in its First Amended Answer, prior to the period before trial during which an amendment requires leave of court, that it did not contest the allegation that appellee injured himself from the admittedly compensable injury, but that he did not sustain permanent injury; that he was not totally disabled for over six weeks; and that he had not even been partially incapacitated beyond December 1, 1966 (the date of the last office visit which the Board compelled him to make to Dr. Farris, for adversary evidence discovery procedures provided in the Board's rules).

Appellant further pled that it had always been willing to furnish appellee all medical and related services. It recited

the facts of its filing of the demand for surgery with the Board which was denied. Of course, the Board refused to proceed in considering the demand for surgery because it did not comply with the requirements of Board Rule 5.201, which in effect requires a prima-facie showing of safety, advisability and beneficial effects to be derived from surgery tendered. The advisability (or necessity of an operation, and certainly the immediate necessity) is not at all likely to coincide with the schedule of a diligent claimant pressing his case through the Board and into the court, as demonstrated by evidence adduced by appellee's own counsel concerning "conservative treatment" as opposed to myelography, and designed to cover a number of months.

Appellant's First Amended Answer also stated

> "that Plaintiff's back is not injured at this time, but that if the jury should

believe . . . that Plaintiff still has an injured back, then . . . it is only because he has refused to submit to the necessary medical and/or surgical treatment which the Defendant tried to furnish him, and the diagnostic procedures which would have confirmed the need for such treatment . . . ." Therefore, Plaintiff should not be awarded any compensation for the period from March 9, 1966 to the time of trial. . . .(I)f Plaintiff's back is still injured from the undisputed accident, he will have no incapacity after a few months following such an operation, which operation would cure the injured condition, if any, . . . and would restore him to full earning capacity while subjecting him to no appreciable risk." R-Tr. 17-20.

Defendant's Bill of Exception No. 1 (R-Tr. 61-62) reflects the granting, before selection of any juror and out of any prospective juror's presence, of the motion in limine by appellee so that

"The court thereby and continuously thereafter excluded all of defendant's tendered evidence as to the advisability, safety, and beneficial effects of surgery . . . to correct such a defective condition, if any, of plaintiff's back . . . .

"Defendant's counsel in his argument on said motion prior to the court's granting the same tendered a certified copy of the proceedings of the Industrial

Accident Board in Claim No. E-16551, upon which claim this cause was based and which certified copy is an exhibit to a later bill of exception made to appear in the Statement of Facts . . . .

"Defendant contended prior to the ruling of the court in granting plaintiff's Motion in Limine that defendant had taken all steps relating to its Demand for Surgical Operation filed with the Industrial Accident Board among its papers with said claim, which it could take or should reasonably have to take as a prerequisite to the introduction in the trial of such evidence excluded by the court's granting said Motion . . .

"Defendant's counsel pointed out that all accrued compensation at the maximum weekly rate had been timely paid to plaintiff until a considerable time after the Industrial Accident Board, which defendant had furnished with all of the medical evidence it had in support of its demand for surgical operation had indicated by letter, a copy of which was among the papers in said Board's claim file, upon which this case was based, that it would take no action on the Demand for Surgical Operation in view of the inadequacy of defendant's support therefor."

The order sustaining Plaintiff's Motion in Limine appears at page 54 in the main transcript.

Appellant summarized the procedural prerequisites for proving the beneficial effects

of surgery in paragraph 2 of its Amended Motion for New Trial. (R-Tr. 41-42).

Also in paragraph 3 of said motion (R-Tr.42) appellant pointed out its inability, and appellee's ability, to produce medical evidence to satisfy Board Rule 5.201, in connection with the evidentiary exclusion which was attacked in the first seven paragraphs through page 44 of the main transcript, in paragraph 4 of which (R-Tr. 42-43) it was observed,

> "for to hold that Defendant did not satisfy all procedural prerequisites for the introduction of such tendered evidence at the trial, and did not satisfy all the statutory steps necessary to place responsibility on the Industrial Accident Board, of whom Defendant never requested a hearing or award in this case, to order an examination of Plaintiff, which duty the Board did not perform, would be to deny to Defendant both the due process of law and the equal protection of the law that is guaranteed by both the federal and State constitutions and laws."

The Texas Supreme Court observed in Courtney that such a duty fell on the Board when a demand

for surgery was filed under section 12e of article 8306.

The unconstitutional argument necessarily deals with the application of the statutes (sections 12b and 12e, article 8306) to appellant. As a matter of law, the Texas Supreme Court in Seelbach, as above-quoted, observed that rights only arise thereunder, and the determination to admit testimony on surgery constitutes an application of the statute in the trial court, which was deemed undesirable under the Seelbach facts. It is necessarily also in the construction of the same statutes to determine that in effect they require a procedure, and pronounce a policy (results, not speculation, concerning surgery at trial) which results in a holding of inadmissibility.

Constitutional complaints were renewed in one of the points of error in the skeleton brief for appellant in the Court of Civil

Appeals, in Point of Error No. 8. Appellant stated on page 9 of that abbreviated instrument, which was later supplemented, that the employee in our fact situation was put to an option of whether to utilize an operation or "avoid it and litigate the case with . . . speculative evidence . . as to what improvement would likely be accomplished had he submitted to it." Appellant further asserted:

> "He has no right to enhance residual disability by avoidance of the effect of testimony which would tend to show how that residual disability could have been reduced, if but only if the question of compensability has been removed. . . . If this were not the rule, a violation of due process and a failure to provide equal protection of the law would result, in that no reasonable means to be heard on the very real issue of what corrective measures might do to reduce incapacity would be available."

The right of a fair opportunity to be heard in any controversy before being subject to liability was claimed as an incident of due

process of law in appellant's Supplemental Brief in the Court of Civil Appeals on page 12. Appellant claimed it had not been given such opportunity.

Appellant also alleged a denial of equal protection of the laws at that point, if trial on facts supporting probable beneficial effects of surgery does not accompany trial of probable incapacity in its absence.

The brief bill of exceptions proving the beneficial effects, safety, and advisability of operating upon appellee, providing his incapacity and clinical picture was as he and his doctor indicated, was taken outside the jury's presence at trial. R-S.F.330-34.

In the supplemental brief supporting the Application for Writ of Error at page 10, appellant asserted in effect that due process and equal protection under federal and state

law required, as an incident, the holding of the claimant to an option to litigate surgical probabilities when liability had been admitted and surgery tendered.

Appellant, in said supplemental brief, complained at page 37 that "The carrier cannot lawfully be made to know more about the bodily condition of the workman than even he may know, upon penalty of inadmissibility of proof as to unperformed surgery's probable effects. The "liability for a specific disabling condition" was an undue admission to require for the predicate in . . . Courtney . . ." Inability to identify it was cited on page 38.

It was alleged on page 39 of said brief that "there is no rational connection between (1) the purpose of assuring that results of surgery may be reduced to actuality instead of speculation, and (2) the prohibition of testimony as to unperformed surgery's probable

effects, when costs and consequences of such surgery, and compensability of the injury and any disability which it produced, assures that there is no need for speculation."

On the same page, appellant claimed the equal protection of proving its alternative defense, in exchange for the claimant proving his incapacity, both matters being based on the same evidence.

Similar arguments, in the appellant's motion for rehearing as petitioner to the State Supreme Court, appear on page 11 thereof and on pages 13-19.

THE QUESTIONS ARE SUBSTANTIAL

This case does not present an isolated instance by any means. It is common knowledge that litigation, in particular concerning the conditions of claimants' backs, is attended with much uncertainty in the jury's minds about the complicated medical proof which approaches them from both sides of a serious personal-injury suit. A silent defendant in a lumbar-disc-injury case brought under a compensation case has an often hopeless position, but the justification could well be what it appeared to be in Seelbach. There were certain seemingly futile steps which the carrier could have taken, but didn't. However, such steps were taken in this case by appellant. Whether or not called for by the prognosis in a case which may not be old enough for the plaintiff or his doctor to feel they know what is wrong with him, the means to concede issues of

compensability, and to assure that rehabilitation will be pursued at insurer expense, is available. Appendix D, infra sets forth the means employed by appellant to moot any such issues and declare itself as ready to perform its duty of helping appellee recover.

There are many beneficial purposes which are not the subject of review in this court concerning this case. But the point is clear that there is not one legitimate purpose which can be offered for the application made of sections 12b and 12e, to effect an unrealistic and unfair hearing where only one side is really given a chance to make its point, although the claimant has been timely assured of both compensability of his claim and a means to rehabilitate.

The irrationality of purpose in suppressing the facts when they relate to the logical inquiry of prospective maximum rehabilitation should be recognized and defeated when there is no necessity for the speculation as to future

physical condition of an injured employee.

An insurer must know when it has vested a right to explore all the facts of modern Twentieth Century medicine, if it cannot satisfy the employee in handling his claim. There will certainly not be any desirable result from preventing this. A refusal to periodically pay claimants who periodically must have the means to sustain themselves and their families will result. A "starve-out" policy for settlement leverage will not only be encouraged by the wrongful application of the Seelbach rule -- it will become a necessary retaliation.

Probably in most cases, a claimant who is receiving compensation will not be rushing his claim to court. There may be time for his "conservative treatment" to do some good, and for some sound medical judgments to be reached. But whether he does this or not is up to the claimant, who can, if he wishes,

put himself on the next available Board docket and, upon award, put his case in the courthouse pending defendant's answer, in one or only a few days thereafter. The prospects for abuse are evident if the means of prohibiting a full hearing lies with him, and there is no means for the carrier to assure that all relevant matters are explored in evidence.

While the Seelbach exclusion under sections 12b and 12e are valid in most instances, a carrier's diligence should enable it to live with this. Denying appellant's relief will necessarily further a wholly unjustified practice where, if he wishes, the claimant may first choose to make no support for his incapacity before the Board, so that there can be no defense to it later when he forcefully presents it to the jury.

Plenary consideration, with briefs and arguments on the merits, are needed in this cause to settle whether this honorable court will declare, as unfounded in reason, that a diligent insurer shall not be left without a defense, faced with no responsibility whatever placed upon the claimant, and indeed, no self-interest for him, to cooperate in recovering from incapacity without delay.

CONCLUSION

For the reasons stated, the questions presented by this appeal are substantial and of public importance. It is respectfully

submitted that probable jurisdiction should be noted.

DOREN R. ESKEW
City Attorney

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By_____
R. L. (BOB) ANDREWS

JAMES W. WILSON
1030 Brown Building
Austin, Texas

By_____
JAMES W. WILSON

ATTORNEYS FOR APPELLANT

APPENDIX A

RULE 483 OF THE TEXAS RULES OF CIVIL PROCEDURE

"In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court will refuse the application with the docket notation 'Refused.' In all cases where the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error which requires reversal, the Court will deny the application, with the notation 'Refused. No Reversible Error.' In all cases where the Supreme Court is without jurisdiction of the case as presented in the application it will dismiss the application with the docket notation, 'Dismissed for Want of Jurisdiction.' . . ." (Emphasis added.)

APPENDIX B

TEXAS REVISED CIVIL STATUTES ANNOTATED
ARTICLE 8306, SECTION 12e

The provisions of Tex. Laws 1917, ch. 103, sec. 1 at 278-79, enacted TEX. REV. CIV. STAT. ANN. art. 8306, sec. 12e, which still reads as follows:

"Sec. 12e. In all cases where liability for compensation exists for an injury sustained by an employe' in the course of his employment and a surgical operation for such injury will effect a cure of the employe' or will materially and beneficially improve his condition, the association or the employe' may demand that a surgical operation be had upon the employe' as herein provided, and the association shall provide and pay for all necessary surgical treatment, medicines and hospital services incident to the performance of said operation, provided the same is had. In case either of said parties demands in writing to the board such operation, the board shall immediately order a medical examination of the employe' in the same manner as is provided for in the section of this law relating to hernia. If it be shown by the examination, report of facts and opinions of experts, all reduced to writing and filed with the board, that such operation is advisable and will relieve the condition of the injured employe' or will materially benefit him, the board shall so state in writing and upon unanimous order of said board in writing, a copy of which shall be delivered to the employe' and the association, shall direct the employee at a time and place therein stated to submit himself to an operation for said injury. If the board should find that said operation

is not advisable, then the employe' shall continue to be compensated for his incapacity under the general provisions of this law. If the board shall unanimously find and so state in writing that said operation is advisable, it shall make its order to that effect, stating the time and place when and where such operation is to be performed, naming the physicians therein who shall perform said operation, and if the employe' refuses to submit to such operation, the board may order or direct the association to suspend the whole or any part of his compensation during the time of said period of refusal. The results of such operation, the question as to whether the injured employe' shall be required to submit thereto and the benefits and liabilities arising therefrom shall attach, be treated, handled and determined by the board in the same way as is provided in the case of hernia in this law."

APPENDIX C

TEXAS REVISED CIVIL STATUTES ANNOTATED
ARTICLE 8306, SECTION 12b

The provisions of Tex. Laws 1917, ch. 103, sec. 1 at 277-78, enacted TEX. REV. CIV. STAT. ANN. art. 8306, sec. 12b (1967), which still reads as follows:

"Sec. 12b. In all claims for hernia resulting from injury sustained in the course of employment, it must be definitely proven to the satisfaction of the board:

1. That there was an injury resulting in hernia.

2. That the hernia appeared suddenly and immediately following the injury.

3. That the hernia did not exist in any degree prior to the injury for which compensation is claimed.

4. That the injury was accompanied by pain.

In all such cases where liability for compensation exists, the association shall provide competent surgical treatment by radical operation. In case the injured employe' refuses to submit to the operation, the board shall immediately order a medical examination of such employe' by a physician or physicians of its own selection at a time and place to be by them named, at which examination the employe' and the association, or either of them, shall have the right to have his or their physician present. The physician or physicians so selected shall make to the board a written report, signed and sworn to, setting forth the facts developed at such examination and giving his or their opinion as to the

advisability or non-advisability of an operation. If it be shown to the board by such examination and such report thereof and the expert opinions thereon that the employe' has any chronic disease or is otherwise in such physical condition as to render it more than ordinarily unsafe to submit to such operation he shall, if unwilling to submit to the operation, be entitled to compensation for incapacity under the general provisions of this law. If the examination and the written report thereof and the expert opinions thereon then on file before the board do not show to the board the existence of disease or other physical condition rendering the operation more than ordinarily unsafe and the board shall unanimously so find and so reduce its findings to writing and file the same in the case and furnish the employe' and the association with a copy of its findings, then if the employe' with the knowledge of the result of such examination, such report, such opinions and such findings, thereafter refuses to submit within a reasonable time, which time shall be fixed in the findings of the board, to such operation, he shall be entitled to compensation for incapacity under the general provisions of this law for a period not exceeding one year.

If the employe' submits to the operation and the same is successful, which shall be determined by the board, he shall in addition to the surgical benefits herein provided for be entitled to compensation for twenty-six weeks from the date of the operation. If such operation is not successful and does not result in death, he shall be paid com-

pensation under the general provisions of this law the same as if such operation had not been had; other than in determining the compensation to be paid to the employe', the board may take into consideration any minor benefits that accrued to the employe' by reason thereof or any aggravation or increased injury which accrued to him by reason thereof.

If the hernia results in death within one year after it is sustained, or the operation results in death, such death shall be held a result of the injury causing such hernia and compensated accordingly under this law. This paragraph shall not apply where the employe' has wilfully refused to submit to an operation which has been found by the examination herein provided for not to be more than ordinarily unsafe."

APPENDIX D

APPELLANT'S TIMELY-FILED DEMAND FOR SURGICAL OPERATION COMMUNICATED TO APPELLEE AS A TENDER

DEMAND FOR SURGICAL OPERATION

Board Number E-16551

Date of Hearing March 22, 1966

Insurance Company City of Austin, Self-Insurer

Claimant Charles A. Webster Social Security # 450-38-7372

Employer City of Austin

Insurance Company Same (self-insurer)

TO THE INDUSTRIAL ACCIDENT BOARD
State Insurance Building
Austin, Texas 78701

The undersigned represents to the Board that the above named claimant sustained injury while employed by the above named employer, on the 25th day of January, 1966, and that in consequence of said injury liability for compensation exists against the City of Austin, a self-insurer, carrying the compensation risk of the employer on the date of injury to the claimant; and that a surgical operation for such injury will effect a cure of the claimant or will materially and beneficially improve his condition.

In accordance with the provisions of Section 12e, Part I, of the Employer's Liability Act, demand in writing is hereby made by the undersigned to the Board for the performance of said operation, at the cost and expense of said insurance company.

CITY OF AUSTIN, TEXAS

BY: /s/ Robert L. Andrews, Jr.
Signature

The Board's Rules require that:

5.20 Any written demand for a surgical operation under Article 8306, Sec. 12e, R.C.S., must be filed with the Board at least seven calendar days prior to the date of hearing. However, where good cause for waiving strict compliance is approved by the Board, parties may file demand or tender of surgery on or before the scheduled date of hearing. (June 20, 1961)

5.201 Demand for Surgery either by the claimant or by the insurance carrier shall be accompanied by a medical report setting forth that an operation will relieve the condition of the injured employee or will materially benefit him and that such operation is immediately necessary and is not ordinarily unsafe. (Nov.1,1954)

[Board file mark is dated March 15, 1966]

Form 107, (Rev 4-65)

APPENDIX E

JUDGMENTS AND ORDERS OF THE COURT OF CIVIL APPEALS

COURT OF CIVIL APPEALS

THIRD SUPREME JUDICIAL DISTRICT

AUSTIN, TEXAS

JUDGMENT AND ORDERS:

JUDGMENT ENTERED JANUARY 31, 1968

CITY OF AUSTIN

VS. NO. 11,562

CHARLES A. WEBSTER

APPEAL FROM 53 DISTRICT COURT OF TRAVIS COUNTY

OPINION BY ASSOCIATE JUSTICE O'QUINN

THIS CAUSE came on to be heard on the transcript of the record and same being inspected, because it is the opinion of the Court that there was no error in the judgment, IT IS THEREFORE considered, adjudged and ordered that the judgment of the trial court be and the same is hereby in all things affirmed; that appellant pay all costs in this behalf

expended and that this decision be certified below for observance.

ORDER ENTERED AUGUST 21, 1967

APPELLANT'S MOTION FOR EXTENSION OF TIME TO FILE BRIEF

MOTION #13,577)

CAUSE #11,562) City of Austin v. Charles A. Webster

Appeal from 53rd District Court of Travis County

Appellant's Motion for Extension of Time to File Brief

Motion is submitted and granted but without regard to time the Court may permit appellee to file a brief

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ORDER ENTERED FEBRUARY 28, 1968

APPELLANT'S MOTION FOR REHEARING

MOTION #13,651)

CAUSE #11,562) City of Austin v. Charles A. Webster

Appeal from 53rd District
Court of Travis County

Appellant's Motion for
Rehearing

Motion is submitted and
overruled

ORDER ENTERED AUGUST 14, 1968

MOTION TO RECALL MANDATE

MOTION #13,722)

CAUSE #11,562) City of Austin v. Charles A.
Webster

Appeal from 53rd District
Court of Travis County

Motion to Recall Mandate

Motion is submitted and
granted

NO. 11,562

IN THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS AT AUSTIN

CITY OF AUSTIN,
Appellant

vs.

CHARLES A. WEBSTER,
Appellee

ORDER ALLOWING ORIGINAL TRANSCRIPT, SUPPLEMENTAL TRANSCRIPT, STATEMENT OF FACTS AND DESIGNATED INSTRUMENTS TO BE SENT TO THE SUPREME COURT OF THE UNITED STATES

It appearing that Appellant is desirous of appealing to the United States Supreme Court in the above cause and it further appearing that Appellant is desirous of sending to the Supreme Court the Transcript, Supplemental Transcript, Statement of Facts and Designated Instruments filed herein and

that the copying of such instruments would be unduly burdensome on the Clerk of this Court, it is ordered that the Clerk of this Court is hereby authorized to send the original Transcript, Supplemental Transcript, Statement of Facts and Designated Instruments herein to the United States Supreme Court as a part of the record on such appeal, it being requested that such Court return to this Court such original instruments when they have fully served their purpose of the United States Supreme Court.

/s/ John C. Phillips
John C. Phillips, Chief Justice

Robert G. Hughes, Associate Justice

/s/ Trueman E. O'Quinn
Trueman E. O'Quinn, Associate Justice

DATED: September 6, 1968

APPENDIX F

OPINION OF THE COURT OF CIVIL APPEALS

IN THE COURT OF CIVIL APPEALS, THIRD

SUPREME JUDICIAL DISTRICT

OF TEXAS, AT AUSTIN

NO. 11,562

CITY OF AUSTIN, APPELLANT

V.

CHARLES A. WEBSTER, APPELLEE

FROM THE DISTRICT COURT OF TRAVIS COUNTY,
53RD JUDICIAL DISTRICT

NO. 155,451, HONORABLE HERMAN JONES, JUDGE

The City of Austin, a self-insurer under Article 8309e of the Texas Workmen's Compensation Law, brings this appeal from judgment in district court awarding total and permanent compensation benefits to Charles A. Webster.

Appellee Webster filed notice of injury and claim for compensation with the Industrial Accident Board on February 15, 1966, for an injury to his back claimed to have occurred January 25, 1966, while working as an employee of the street and bridge department.

Appellant City of Austin on March 15, 1966, filed with the Board certain forms, a letter from its attorney, and two medical reports from Dr. Robert G. Farris showing results of examinations made of Webster February 3 and March 9. The City of Austin contends that based on these filings adequate admission of liability and proper demand for surgery were made.

The Board on March 21, 1966, advised the City of Austin that no action was being taken by the Board on the demand for surgical operation "since the medical evidence does not support demand for surgery according to the provisions of Board Rule 5.201." The rule requires that the demand for surgery, by either the claimant or the insurer "shall be accompanied by a medical report setting forth that an operation will relieve the condition of the injured employee or will materially benefit him and that such operation is immediately necessary and is not ordinarily unsafe."

In neither of his reports did Dr. Farris recommend surgery. In the first report Dr. Farris recommended that Webster remain off work and expressed a desire to re-examine the claimant "in ten days." In the second report, dated March 9, Dr. Farris stated, "The patient's physical findings are virtually nil at this time," and made no recommendation of surgical treatment.

Payments to Webster were discontinued by the City of Austin September 16, 1966. Webster requested a hearing October 13, and

on November 9 the insurer requested an additional examination by Dr. Farris.

Based on his examination of Webster on December 1, 1966, Dr. Farris reported:

> "At this time the patient would be able to pass any pre-employment physical examination. He has no discernable (sic) or determinable impairment of function and I see no reason why he could not be working daily. One wonders why a healthy looking young man like this does not go out and work * * *
>
> I am unable to make any medical diagnosis on the man at this time and have no recommendations for further diagnostic procedure or treatment."

The Industrial Accident Board entered its award December 27, 1966, and denied the demand for surgery. Webster appealed from award of the Board and filed suit in district court January 3, 1967.

The trial court refused to permit the City of Austin to introduce evidence of the safety, advisability and probable beneficial effects of surgery upon Webster's back. The jury found from evidence, which the City of Austin admits was sufficient, that Webster's total incapacity was permanent. Judgment of the district court allowed credit for prior compensation payments to Webster, but allowed no credit for payment of personnel policy benefits. The judgment also expressly provided that no adjudication was made with respect to Webster's claim for future medical aid, hospital services, nursing, chiropractic services and medicines.

Appellant City of Austin under three points of error contends (1) that evidence regarding possible beneficial effects of surgery should have been admitted, (2) that credit for personnel policy payments was improperly denied, and (3) that the court should have adjudged affirmatively that the City of Austin would not be liable for future medical and hospital services.

We consider the first point of error controlled by the holding of the Supreme Court in Truck Insurance Exchange v. Seelbach, 161 Tex. 250, 339 S.W.2d 521, and case law stemming from that decision. In the Seelbach case the Supreme Court construed the surgery sections of Article 8306 (Sections 12b and 12e), Vernon's Ann.Civ.St., to give the Industrial Accident Board exclusive power to order or supervise an operation or to direct a medical examination for the purpose of determining the advisability of an operation. The courts were held not to be clothed with such powers. "Where the statute directs that action be taken in a certain way," the Court declared, "it may be performed in no other manner." 339 S.W.2d 521,523, col. 2.

The City of Austin contends that it complied with the steps required of it to invoke the action of the Industrial Accident Board and to lay a predicate for the introduction of evidence in trial court as to beneficial effects of surgery. While there may be some doubt that the admission of liability was sufficient, we do not find it necessary to decide this question. Assuming that all steps were timely and properly taken by the City of Austin, the Board did not order an operation and put the claimant to an election to undergo surgery or not. The Board denied the demand

for surgery. Similar facts were before the Supreme Court in Garcia v. Travelers Insurance Company, 365 S.W.2d 916 (Tex.1963) in which it was held that neither the trial court nor the court of civil appeals could direct and supervise an operation. The insurer was not entitled to prove the beneficial effects of surgery.

In Houston Fire and Casualty Insurance Company v. Dieter, 409 S.W.2d 838 (Tex. 1966) the Supreme Court distinguished cases in which medical testimony may be tendered asserting beneficial effects of "unperformed surgery," as in the Seelbach and Garcia cases, from those cases in which "surgical procedures have been utilized." In the Dieter case it was held that results of an operation were properly the subject of proof. In such case, the Court pointed out, " * * * the trial court is not being called upon to order or supervise surgery or act in any respect as an administrative board." 409 S.W.2d 838, 841, col. 1.

In the Dieter case the Supreme Court reviewed the problems presented in the Seelbach case, which the Court observed to be "two-fold; first, the obvious speculative element of opinion testimony as to the possible results of surgery which had not occurred and might never occur; and second, the undesirable result which was described as being 'tantamount to applying the provisions of secs. 12b and 12e in the trial court.'" 409 S.W.2d 838, 840, col. 2.

The question of an operation must be decided while the case is before the Industrial Accident Board. Consolidated Underwriters v.

Foster, 383 S.W.2d 829, Tex.Civ.App., Tyler, writ ref., n.r.e.: Texas Employers' Ins. Assn. v. Ellis, 365 S.W.2d 676, Tex.Civ.App., Texarkana, writ ref., n.r.e. The inquiry at the trial of a workmen's compensation case is the extent of incapacity of the injured employee at that time. Houston Fire and Casualty Insurance Co. v. Dieter, supra.

Assuming as we have that the City of Austin made timely and valid admissions of liability and demand for surgery before the Board, it is clear that the Board had before it no evidence that an operation would cure or improve Webster's condition. The Board decided the question of operation, or the need for an operation, when it denied the demand for surgery. Evidence in the trial court concerning beneficial effects of an operation was inadmissible. Consolidated Underwriters v. Foster, supra; Aetna Casualty and Surety Company v. Depoister, 393 S.W.2d 822, Tex. Civ.App., Corpus Christi, writ ref., n.r.e.

It would appear that the surgery sections of Article 8306 were meant to afford an administrative means of inquiring into the advisability of an operation to cure or relieve the effects of an injury to the workman. Under this statute the Board by unanimous action may order an operation when it is advisable. We think it was not contemplated that the insurer would be permitted, by admitting liability and demanding surgery before the Board, to prove in court by "conjecture and opinion evidence" that the extent and duration of the claimant's disability and

his incapacity might be reduced through surgery, after the Board has refused to order an operation. Seelbach case, 339 S.W.2d 521, 524, col. 2.

The trial court properly excluded all evidence of the safety, advisability and probable beneficial effects of surgery upon the claimant's back. Appellant's first point is overruled.

Under its second point, Appellant City of Austin argues that under the trial court's judgment credit should have been allowed the insurer for personnel policy payments made to the claimant. The judgment awarded total and permanent disability benefits and allowed credit for all workmen's compensation payments previously made to the claimant. The judgment did not allow credit for $437.48 in personnel policy payments.

We consider this question settled by this Court in City of Austin v. Clendennen, 323 S.W.2d 158, Tex.Civ.App., Austin, writ ref., n.r.e. The second point is overruled.

Appellant complains under point three that the trial court did not affirmatively decree that the City of Austin would not as an insurer be liable in the future for medical and hospital services required to treat the injury claimed under this case. Appellee confesses on appeal not to have asserted a claim for future medical expenses in this lawsuit.

Under the holding of the Supreme Court of Texas in City of Austin v. Crooks, 162 Tex.

189, 346 S.W.2d 115, we believe the provisions of section 7 of Article 8306, as it read prior to amendment in 1957, limit liability of the municipal insurer for hospital services to a period of 180 days from the date of injury. While the claimant did not seek future medical expenses, and inclusion in the trial court's judgment of the statement that no adjudication of future expenses was made appears to have been invited by appellant in its objection to motion for judgment, we feel inclusion of the statement does not prejudice the insurer. We decline to reform the trial court's judgment to delete the statement. The third point is overruled.

The judgment of the district court is affirmed.

Trueman E. O'Quinn, Associate Justice

Affirmed

Filed: January 31, 1968

APPENDIX G

JUDGMENTS AND ORDERS OF THE TEXAS SUPREME COURT

IN THE SUPREME COURT OF TEXAS

No. B-826 May 15, 1968

CITY OF AUSTIN)
) From TRAVIS COUNTY
Vs.)
) THIRD DISTRICT
CHARLES A. WEBSTER)

Application of petitioner for writ of error to the Court of Civil Appeals for the Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant, City of Austin, pay all costs incurred on this application.

No. B-826 June 12, 1968

CITY OF AUSTIN)
) From TRAVIS COUNTY
Vs.)
) THIRD DISTRICT
CHARLES A. WEBSTER)

Petitioner motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the order of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 4th day of September, 1968.

GARSON R. JACKSON, Clerk

By /s/ Eugene Cervenka, Deputy.

The following caption and title appears on the reverse of the above certified orders.

No._____

IN THE SUPREME
COURT OF TEXAS

- - - -

vs.

- - - -

Certified copy of Order of the Supreme Court of Texas. (Application for Writ of Error REFUSED-N.R.E.)

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